

TAMMY C. HASTY)	
Claimant)	
)	
VS.)	
)	
SAINT GOBAIN CALMAR)	
Respondent)	Docket No. 1,022,899
)	
AND)	
)	
ACE AMERICAN INS. CO.)	
Insurance Carrier)	

Respondent requests review of the June 9, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

The ALJ found that the "[c]laimant was injured out of and in the course of her employment with [r]espondent each and every working day through April 4, 2005, by aggravating a previous condition".¹ Accordingly, he ordered respondent to furnish medical treatment and temporary total disability benefits in the event respondent is unable to accommodate the claimant's restrictions.

The respondent requests review of this decision alleging claimant's ongoing bilateral knee problems are due to a longstanding personal condition rather than to her repetitive work duties. Thus, respondent requests the Board reverse the ALJ's decision and deny claimant compensation.

Claimant argues the evidence establishes that her repetitive work duties from January 17, 2005 and up to April 4, 2005, caused an aggravation to her right knee

¹ ALJ Order (June 9, 2005).

condition as well as an injury to her left knee. Thus, claimant contends the ALJ's preliminary hearing Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's preliminary hearing Order should be affirmed.

Claimant has been employed by respondent since 1998 in various positions, most recently as a general attendant. According to respondent's human resources manager, claimant's job (as of January 17, 2005) required her to work 8 hours per day on her feet, bending, lifting, kneeling, squatting and climbing.²

Beginning in July 2001, claimant began to experience right knee problems. She sought treatment from Dr. Christopher W. Siwek and was diagnosed with a torn lateral meniscus and early degenerative osteoarthritis. After a period of ongoing complaints claimant ultimately had surgery to repair the tear. Following surgery in August 2001 claimant returned to work, although her right knee complaints continued on and off over the next few months.

In January 2002, claimant returned to see Dr. Siwek with further right knee complaints. Over time he recommended and provided injections to ameliorate her complaints and for a time, these helped. Then, in March of 2004, she again sought treatment from Dr. Siwek as she had an increase in right knee pain. She also reported that her knee was popping, catching and locking. After an injection, her complaints subsided. Then again in early June 2004, she had an increase of symptoms in her right knee. And as before, an injection was provided and her symptoms subsided for a time.

Unfortunately, by late June, her symptoms returned and Dr. Siwek performed surgery to the right knee. Claimant's recovery from this surgery was complicated as she developed an infection. As a result, she was not allowed to return to work until January 17, 2005 and then, with restrictions.

When claimant returned to work she was assigned to work as a "general attendant". This job involved standing up and sitting down, occasional periods of walking and standing on concrete floors followed by periods of being seated in a chair at a table that did not allow claimant to elevate her lower right leg. She would also have to bend over and squat down to pick up boxes.

In March 2005, claimant noted that her left knee was beginning to pop and grind. Claimant attributes this left knee pain to "probably walking on concrete floors and

² P.H. Trans., Cl. Ex. 4 at 2.

overcompensating because of my right knee being so bad, I'm having to put all my dependency on my left knee. And the repetitive action of getting up and down out of the chair and walking back and forth to the break room on the concrete I think aggravated both knees."³

In April 2005, claimant received a letter stating that she had to return to full duty by May 15, 2005 or her employment would be terminated as it is respondent's policy that one can only be on restricted duty for 120 days and her time would soon be up.⁴ As a result, claimant went to Dr. Siwek and got him to release her to full duty as of May 15, 2005.

Val Jacobs, respondent's Human Resources Manager, contacted Dr. Siwek and explained that claimant's job required her to work an 8 hour shift on her feet, and to bend, lift kneel, squat and climb. Claimant maintains she was also required to sit at a table in a plastic chair in a position that did not allow for propping up her knee.

In June 2005, claimant was directed to have a functional capacities evaluation (FCE) at the respondent's request because they were not sure that she would be able to perform her work. Claimant never actually saw the results herself, but was told that by the barest of minimums she had demonstrated an ability to perform her job, within certain restrictions. Claimant was then sent for another FCE by another testing facility. These results do not appear within the record.

At her counsel's request, claimant saw Dr. Michael H. Munhall for an independent medical examination on May 19, 2005. At that time claimant's chief complaint was bilateral knee pain. Dr. Munhall in his report stated that claimant believed her left knee complaints began when she returned to work with restrictions on January 17, 2005 as a result of having to compensate for the limited use of her right knee due to previous injury and surgery. Dr. Munhall diagnosed bilateral knee pain upon examination. He opined that claimant's complaints and this diagnosis are causally related to claimant's injuries she sustained in May of 2001 and each and every working day thereafter including April 4, 2005 during her employment with respondent. At this time claimant was not found to be at maximum medical improvement, but was given the restrictions of performing sedentary work, no stairs, squatting, kneeling or climbing.⁵

Dr. Munhall felt that claimant required an orthopedic second opinion regarding the evolution of bilateral degenerative osteoarthritis of her knees. It was his opinion that the claimant requires aggressive physical therapy, work conditioning, and a pool program to restore knee range of motion, strengthening, and improved functional weightbearing

³ Claimant's Depo. at 23-24.

⁴ P.H. Trans., Cl. Ex. 4.

⁵ *Id.*, Cl. Ex. 1 at 3.

activities. It is was also his opinion that the claimant may require additional orthopedic surgery including right total knee replacement and also may require a preoperative assessment by infectious disease, bone scan, culture and sensitivity and laboratory work to rule out chronic right knee infection. Finally he believed that the claimant may require knee bracing, injections, medication management, and sedentary work place activities without kneeling, squatting, climbing, or stairs.⁶

The ALJ concluded the evidence established an aggravation of a previous condition. He specifically referenced respondent's description of claimant's job duties. The Board has considered the evidence contained within the record and finds no reason to disturb the ALJ's legal conclusion.

The evidence, taken as a whole, establishes that the nature of claimant's job was repetitive in nature and included tasks that would likely aggravate a degenerative knee condition. Dr. Munhall spoke to this issue and opined that claimant's job activities not only aggravated her right knee condition, which has plagued her since 1991, but has now also aggravated her left knee as well.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁷ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁸ These facts present an instance where this rule is particularly applicable. Clearly claimant has a personal condition, degenerative osteoarthritis, which has existed in her right knee since 1991 and was recently diagnosed in her left knee. The Board is persuaded by the opinions of Dr. Munhall who has indicated that claimant's work activities have contributed to her present complaints. The Board finds the ALJ's legal conclusions are well-founded and should not be disturbed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.⁹

⁶ *Id.* at 4.

⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

⁹ K.S.A. 44-534a(a)(2).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated June 9, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director